United States Government

NATIONAL LABOR RELATIONS BOARD
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April 13, 2011

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Pennsylvania State Corrections Officers Association
Cases 4-CA-37648, 4-CA-37649 and 4-CA-37652

Dear Mr. Heltzer:

Enclosed find an original and seven copies of Counsel for the Acting General Counsel's Exceptions and Brief in Support of Exceptions in the above captioned matter. Copies this day have been served on the persons listed below by first class mail.

Very truly yours,

HENRY R. PROTAS
Counsel for the Acting General Counsel

cc:

Richardson Todd Eagan, Esquire, 2705 North Front Street, Harrisburg, PA 17110
Larry D. Sonnie, Jr., President, Business Agents Representing State Union Employees
P.O. Box 60561, Harrisburg, PA 17106-0561
Mr. Shawn Hood, 9 Oak Drive, Pittsburgh, PA 15214

HRP/jm

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

PENNSYLVANIA STATE CORRECTIONS
OFFICERS ASSOCIATION

and

Cases 4-CA-37648
4-CA-37649
4-CA-37652

BUSINESS AGENTS REPRESENTING
STATE UNION EMPLOYEES ASSOCIATION

BRIEF BY COUNSEL FOR THE ACTING GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS

To: Lester A. Heltzer, Executive Secretary
National Labor Relations Board

Dated: April 13, 2011

HENRY R. PROTAS
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I. STATEMENT OF THE CASE

The Acting Regional Director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on October 29, 2010[1] (GCX-1(i)), a copy of which was served on Pennsylvania State Corrections Officers Association, herein called the Respondent, on the same day. (GCX-1(j)) Respondent filed an Answer to the Consolidated Complaint on November 12, 2010. (GCX-1(k)) The Regional Director issued Amendments to the Consolidated Complaint on November 17, 2010 (GCX-1(l), a copy of which was served on Respondent on the same day. (GCX-1(m)) Respondent filed an Answer to the Amendments to the Consolidated Complaint on December 1, 2010. (GCX-1(n)).

A hearing in this matter was held before Administrative Law Judge Robert A. Giannasi on January 26 and 27, 2011.

On March 17, 2011 Counsel for the Acting General Counsel filed with the Administrative Law Judge a Motion to Strike a Portion of Respondent's brief which had been filed on March 11, 2011. To date there has been no ruling on the Motion.

Administrative Law Judge Robert A. Giannasi issued his Decision in this matter on March 17, 2011. This brief is filed in support of Counsel for the Acting General Counsel's Exceptions to the Judge's Decision.

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[1] Throughout this brief, references to the record and the Administrative Law Judge's Decision will be as follows:

Transcript..... T	(followed by page number)
General Counsel's Exhibit.....GCX	(followed by exhibit number)
Respondent's Exhibit .....RX	(followed by exhibit number)
Administrative Law Judge's Decision...ALJD	(followed by page and line number)

II. STATEMENT OF FACTS

Respondent is a labor organization that represents employees of the Commonwealth of Pennsylvania employed at the Commonwealth's twenty-six correctional institutions and two forensic security units. The bargaining unit is comprised of correctional officers as well as employees employed in about sixty-six other job classifications. There are about 11,000 employees in the bargaining unit. (T-9, 10) Respondent's office is located in Harrisburg, Pennsylvania. (T-17)

At each facility there is a local union. Local leadership is comprised of a President, Vice-President, Secretary-Treasurer and executive board members. Although there is a single collective bargaining agreement that covers the entire bargaining unit, union leadership at the local level is empowered to supplement the collective bargaining agreement by negotiating side agreements. They may also handle grievances at the first level of grievance arbitration procedure in Respondent's collective bargaining agreement with the Commonwealth. (GCX-10, 11)

The Commonwealth has recognized Respondent as the exclusive collective bargaining representative of this statewide unit since June of 2001. (T-9) In September 2001, Respondent adopted a constitution. It is still in effect. (GCX-2, T-13). Consistent with its constitution, Respondent has had a President, an Executive Vice-President, an Eastern Vice-President, a Western Vice-President and a Secretary-Treasurer. There are also eight at large positions that are elected to serve along with the officers on Respondent's Executive Board. (GCX-2 Article V Section 2, Article VI, Section 1, T-17) The election of officers and Executive Board members is to take place every three years in June by mail ballot according to rules established by an election committee and

approved by the Executive Board.[2] (GCX-2 Article VII Section 1(b)) Officers and Executive Board members who have been certified as elected are to be sworn in and take office no later than the first Monday following 30 days after their election. (GCX-2 Article VII Section 1(i)) Article VII Section 1(n) of the constitution states, "All officers and Executive Board members shall hold office until their successor is duly elected, qualified and installed." Article V Section 2 states, "The officers shall hold office for three years, or until their successors are duly chosen and qualified. Their terms, unless to fill a vacancy, shall commence on the first Monday following thirty (30) days from the date of their election, unless otherwise provided in this Constitution." (GCX-2)

Upon its creation, Don McNany was Respondent's Western Vice-President. (T-11) He became Respondent's President in August 2002, when the incumbent President resigned. (T-11). He remained in office and again ran for election in June 2010.

In about June 2009, Roy Pinto, who was McNany's Eastern Vice-President announced a slate of candidates to run for officer positions against McNany's slate. He eventually assembled a slate to run for all thirteen positions on the Executive Board. (T-174) For the thirteen member Executive Board, Pinto's slate only included four incumbent members – Eastern Vice-President Pinto and three non-officer Executive Board members, Jason Bloom, Bob Storm and Tim Walsh. (T-18, 19) Don McNany also had to assemble a slate of candidates to fill all thirteen Executive Board positions. His slate included seven individuals who were already serving on the Board and two new candidates who would replace Tammy Lepley who was an Executive Board member that had retired and Sam Brezler, who had retired and was serving out his term as

[2] Members of the election committee are appointed by the President, upon approval of the Executive Board. (GCX-2 Article VIII Section 3)

Respondent's Secretary-Treasurer. (T-21) Lepley and Brezler, who had formerly run on McNany's slate, were replaced with new candidates. (T-23) McNany, of course, also selected supporters to run as candidates to fill the positions already held by Pinto, Bloom, Storm and Walsh. (T-21) A third slate of candidates that referred to itself as "The People" also ran a full slate of candidates for election. (RX-1)

A mail ballot election was conducted and the ballots were counted on June 25, 2010. (T-12, 19, 20) The election resulted in candidates for only four of thirteen positions on the Executive Board receiving a majority of the votes that were cast. The successful candidates were Roy Pinto, who ran for President, Jason Bloom, who ran for Western Vice-President and Ralph Tressler and Mark Truszkowski, who ran for positions on the Executive Board.[3](GCX-8 page 3) Under the election rules there would need to be a runoff election to determine the winner of the remaining nine positions. (T-26, GCX-8 page 3)

Until the June 25, 2010 election, an incumbent officer of Respondent had never lost an election. (T-13, 162, 186, 209) Thus, there was no past practice that would suggest that the constitutional provision stating that McNany would continue to hold his office until the new President was sworn in did not apply. Nevertheless, Roy Pinto testified that he believed that he was Respondent's President effective July 1, 2010. [4] (T-186, 187) Despite the clarity of the above cited constitutional provisions which establish that Pinto

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[3] The Administrative Law Judge incorrectly stated that Pinto and four members of his slate were determined to have won their elections. (ALJD p. 2, l. 47-50, GCX-8)

[4] Without providing specific evidence concerning whether it ever actually happened or the circumstances when it allegedly happened, Roy Pinto claimed that if an Executive Board member resigned, the new member would replace the old member starting July 1st. (T-186) Even Roy Pinto had to concede that Don McNany did not resign his position. (T-209)

and the other three successful candidates had no right to be sworn in to office until the first Monday following 30 days after the certification of the June 25, 2010 election results and that the incumbents would remain in office until Pinto and the other three candidates were installed, the Administrative Law Judge throughout his Decision repeatedly and incorrectly suggested that there was some factual basis to question whether Don McNany was Respondent's President up through July 20, 2010, when Roy Pinto was sworn in as Respondent's President. (ALJD p. 2, l. 38-42, 45-50; p. 4, l. 15,16; p. 5, l. 29, 30, 33-37; p 6, l. 25-26) This distortion of the facts served as an underpinning for the Administrative Law Judge's conclusion that Roy Pinto had neither actual authority nor apparent authority on July 19, 2010 to execute a collective bargaining agreement on behalf of Respondent. (ALJD p. p. 5, l. 39-30)

In late April or early May 2010 some of Respondent's Business Agents started discussing forming a union. These discussions led to the formation of the Charging Party, Business Agents Representing State Union Employees Association, herein called BARSUEA. (T-84) BARSUEA's President was Business Agent Shawn Hood, its Vice-President was Business Agent John Miller and its Secretary-Treasurer was Patricia Hurd. Its Executive Board also included Business Agents Larry Blackwell and Robert Smith. (T-85, 86, 140)

On June 24, 2010 Shawn Hood on behalf of BARSUEA faxed a representation petition to Region Four of the Board seeking to represent a unit consisting of the Employers' business agents and clerical employees. At the time there were thirteen business agents and about seven clerical employees employed by Respondent. The petition was docketed on June 25, 2010. (GCX-3, T-86, 136)

The Petition listed Roy Pinto as Respondent's representative. The Region sent Roy Pinto a copy of the petition, a Notice of Representation Hearing, a letter from the Regional Director explaining how petitions are processed and a service sheet. (GCX-3, T-86, 163) On June 28, 2010, after opening up the envelope containing these materials, Roy Pinto walked into Don McNany's office, laid the materials on his desk and told him that he should handle it. (T-14, 15, 17, 189, 193)

It is apparent that Respondent, through Roy Pinto, sought to avoid its statutory obligations with respect to BARSUEA by falsely claiming that Pinto was completely out of the loop with respect to the union's existence. After being shown the representation petition addressed to him, Pinto testified that even though he knew a petition had been filed, he didn't know that BARSUEA existed until he received grievances filed by BARSUEA.[5] (T-163) He later changed his testimony to claim that he didn't know anything about BARSUEA until BARSUEA forwarded Respondent an information request on August 16, 2010 (GCX- 13, T-197, 198, 216) In a letter to BARSUEA dated August 27, 2010, Respondent's attorney adopted Pinto's position, and wrote, "The PSCOA just recently learned of the existence of your organization,..." (GCX-16, T-172) The Administrative Law Judge ignored all of this patently false testimony and compounded it by failing to affirmatively acknowledge in his Decision that since Roy Pinto admittedly received the Petition by June 28, 2010 he obviously also knew that BARSUEA existed and that it was seeking to represent Respondent's employees.

Although Roy Pinto had just won the election to replace McNany and claimed to have been entitled to assume office on July 1, 2010, Pinto testified that he told McNany

[5] The grievances were filed on August 23, 2010 (GCX-15, T-170)

on June 28, 2010 to handle the petition because he was not yet the President. (T-190) However, nothing changed on July 1, 2010. After telling McNany to handle the matter, he made no inquiries concerning the petition. (T-163) He also chose not to refer the matter to the Executive Board. (T-174, 175) He explained his failure inquire into the matter as follows: "No, I was a little busy in court for stopping people from stealing an election. [sic]" (T-163) He gave the same excuse for his failure to alert the Executive Board. (T-174, 175)

Indeed Roy Pinto was busy in Court. On July 2, 2010 he filed with the Court of Common Pleas for Dauphin County an Application for Preliminary Injunction against Respondent's Election Committee. (GCX-7) Despite claiming in the instant proceeding that he was entitled to be installed as President effective July 1, 2010, he made no such claim in his Application. The ballot count in the June 25, 2010 election showed that Pinto received only 2,276 votes out of 4,530 ballots cast or just 11 votes sufficient to avoid a runoff election. (R-1) Respondent's election committee suggested that the ballots, which had been electronically counted, should be manually recounted. Therefore as of the July 2, 2010 filing date of the Petition, Pinto had not yet been certified as the winner of the election. The Court ultimately agreed with Pinto's Petition that a manual recount was unwarranted and ordered that Pinto and the other three candidates, who according to the initial count had received a majority of the votes cast, should be certified as having won on July 8, 2010 and should be sworn into office on or before August 9, 2010.[6] The Court

[6] The July 8, 2010 certification date and the August 9, 2010 date by which the Pinto and the other three successful candidates were to be sworn in to office is consistent with Section VII of the election rules (GCX-8 page 3) and Article V Section 2 of the constitution. (GCX-2 page 4) Again, contrary to Administrative Law Judge's view, this establishes that there was no confusion or lack of clarity as to when Pinto succeeded

also ordered that ballots be sent out to members in the runoff election for the remaining nine unresolved positions as soon as possible, but no later than 14 days from the July 15, 2010 date of its Order. (GCX-8 page 6) Contrary to the implication in the Administrative Law Judge's Decision, there was no issue with respect to the clear language in Respondent's Constitution and election rules which established that Pinto had no right to be sworn in to office until the first Monday following 30 days after the certification of the results of the June 25, 2010 election and that McNany would remain in office until Pinto was sworn into office. (GCX-8)

Roy Pinto in support his July 2, 2010 Application for Preliminary Injunction argued as follows:

> 4. The Refusal of the Election Committee to certify the individuals at issue here as the duly elected office holders is in violation of PSCOA Election Rules, places the PSCOA at risk of being burdened with a lame duck, last minute collective bargaining obligation to previously "at will employees" of the organization selected by a prior administration. (GCX-7 page 3)

Thus, it is clear that rather than being distracted from Respondent's employees' efforts to unionize, it was a prime motivation for his efforts to unseat McNany and his supporters sooner rather than later. As events unfolded, he was not going to acknowledge BARSUEA's existence until he could deal with them on his terms with his supporters in office.

It was revealing and therefore not mentioned by Administrative Law Judge that Roy Pinto's efforts to prevent the incumbent administration from entering into a "lame

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McNany as President of Respondent. If there had been any issue on this point it was resolved by Judge Dowling. His decision clearly established that Pinto did not become President immediately upon either the conduct of the election or upon the certification of the results. (GCX-8)

duck" contract didn't claim that McNany would have no authority to enter into an contract. Instead the underlying assumption of the lawsuit was that McNany did have the authority to enter into a contract and that the only way to stop him was to replace him as President before it happened.

On July 2, 2010 Ed McConnell, Respondent's Executive Vice-President, a member of the Executive Board and candidate on McNany's slate, who would be participating in a runoff election, signed an election agreement on behalf of the Respondent. Shawn Hood signed on behalf of BARSUEA. The agreement scheduled an election to take place at Respondent's Harrisburg headquarters on July 12, 2010. (GCX-4, T-24-26)

On July 6, 2010, Don McNany posted the Notice of Election prominently on bulletin boards in each of the buildings where Respondent's offices are located.[7] The Notice remained posted through the date of the election and was admittedly seen by Roy Pinto. (GCX-5, T-26-28, 192)

It also appears that Roy Pinto was present at the Harrisburg office on the date of the election. He was seen driving his car down an alley that runs behind Respondent's

[7] The Administrative Law Judge sought to bolster his claim that there was some confusion concerning whether Don McNany was President after the June 25, 2010 election by stating that McNany moved out of his office on June 29, 2010 and that Roy Pinto moved in on the same day. (ALJD p. 2, l. 40-41; p. 5, l. 36-37) This finding was apparently based on Roy Pinto's response to a leading question in which he stated that he never saw Don McNany in Harrisburg after June 29, 2010. (T-190-192) The Administrative Law Judge ignored both the fact that Don McNany posted the Election Notice at Respondent's offices on July 6, 2010 and his testimony that he was present at his office four or five times in July and was not completely moved out until the middle of July. (T-55) The Administrative Law Judge also ignored the fact that upon further questioning Roy Pinto acknowledged that he wasn't even present at the offices to see McNany during the first week of July. (T-191)

buildings. (T-90-91) Nevertheless, Respondent would have it believed that Pinto was never told and never thought to ask whether BARSUEA had won the election.

BARSUEA did, in fact, win the election on July 12, 2010 and was certified as the exclusive collective bargaining representative of the unit on July 21, 2010. (GCX-6, T-28)

Between July 12 and July 19, 2010, Respondent represented by Don McNany and BARSUEA represented by Shawn Hood engaged in negotiations for a collective bargaining agreement. The met in person three or four times and also discussed issues over the phone. Each attended negotiations by themselves although McNany consulted with Respondent's attorney on a couple of occasions. (T-33, 34, 36, 87) At one point during the negotiations, Shawn Hood asked McNany if anyone else had to be present for negotiations and whether anyone else's signature was needed to execute a contract. Don McNany assured Hood that no one else needed to be present. (T-34, 35, 87) At no point did Don McNany say or indicate that Respondent's entry into a collective bargaining agreement was subject to Respondent's Executive Board's approval. (T-35, 87, 88)

Don McNany believed that he had the authority to enter into a collective bargaining agreement because the constitution delegated the day-to-day operations of Respondent to the President. (T-35, 36) Article V Section 3(a) of the constitution states, "The President shall have direction and supervision of all subordinate bodies, unless otherwise determined by the Executive Board, and shall exercise day-to-day supervision over the affairs of the Association, consistent with policies established by the Executive Board." Article V, Section 3(g) states further that, "When the President makes a decision or issues an order to a subordinate body or to the officers or members thereof, the same

shall be complied with until such decision or order is reversed by the Executive Board." (GCX-2) Faced with these provisions of constitution which suggest that, unless and until the Executive Board decides otherwise, the President would have the authority to negotiate and sign a collective bargaining agreement, the Administrative Law Judge chose to simply not mention them in concluding that the President had no authority to bind Respondent to a collective bargaining agreement without the approval of the Executive Board. (ALJD p. 5, l. 43-52; p. 6 l. 1-9)

Don McNany was on the Committee that originally drafted the constitution and knew that it did not specifically address collective bargaining responsibilities. (T-50) Despite his finding, even the Administrative Law Judge acknowledged this to be the case. (ALJD p. 5, l. 49, 51) This was the first time in Respondent's history that its employees had sought to engage in collective bargaining. (T-17) In assessing his authority, McNany was therefore guided by the fact that historically it was up to the President in the first instance to interpret the constitution. (T-36, 68) His view of his interpretive role is supported by Article V, Section 3(i) which states, "When any question arises regarding the construction or interpretation of the Constitution, the President shall in the first instance, decide any such question subject to the approval of the Executive Board. The President's interpretation and construction of the Constitution shall be accepted and shall be binding upon all parties, subordinate bodies, officers pending approval or change of such interpretation or construction of the Constitution by the Executive Board."[8] (GCX-2) The Administrative Law Judge distorted the plain meaning of this provision by only

[8] Article IV, Section 5 of the constitution by implication confirms the authority of the President, as well as the Executive Board, to make decisions that bind Respondent. (GCX-2)

referring to the first sentence, which states that the President's interpretative authority is subject to the approval of Executive Board. By doing so, he was able to, in effect, assert that unless the Executive Board approved of his interpretation of the constitution, Don McNany's interpretation of his authority under the constitution had no effect. (ALJD p. 6, l. 9-14) The second sentence of the provision, which was not cited by the Administrative Law Judge, of course, states just the opposite. It clearly states that unless and until the Executive Board overrules or changes the President's interpretation, the President' interpretation is binding on all parties.

McNany's belief that he had the authority to enter into a collective bargaining agreement was also influenced by the fact that on June 28, 2010 when Respondent first received the representation petition his political rival and a current member of the Executive Board, Roy Pinto told him to handle it. (T-35) This is exactly what he did. McNany acknowledged that he did not convene a vote of the Executive Board concerning his authority to deal with BARSUEA. (T-37, 38, 71, 71) Although the Executive Board had the authority to overrule the President with respect to his role in collective bargaining, there was nothing incumbent upon the President to request a vote of the Executive Board on the issue.[9]

If there was anyone who would appear to have had an interest in asserting the Executive Board's authority to change the President's interpretation of his authority to deal with BARSUEA it would appear to have been Roy Pinto. Article VI, Section 1(c) states, "In all matters requiring action by the Executive Board, when the Executive Board

[9] Neither Roy Pinto nor any other member of the Executive Board ever suggested to Don McNany that he should seek approval or authority from the Executive Board to enter into a collective bargaining agreement. (T-38)

is not in formal session, the Executive Board may act by telegram, letter, facsimile or long-distance telephone or by other satisfactory means of computer-generated communication. Such action so taken by the members of the Executive Board shall constitute action by the Executive Board as though the Executive Board was in formal session." (GCX-2) Roy Pinto or any member of Executive Board had the right on short notice to have Don McNany's authority to "handle" the petition or any other issue related to collective bargaining put before the Executive Board for a vote. (T-18, 19, 175) As noted earlier although he claimed not to know that BARSUEA even existed (T-163), Pinto was well aware of the union's petition and the July 12, 2010 election. It also can't be said that his failure to assert the Executive Board's authority was due to a lack of concern over the prospect of McNany, on behalf of Respondent, entering into a collective bargaining agreement with BARSUEA. He argued that it was this prospect, which warranted injunctive relief, to install him as President. (GCX-7) After claiming total ignorance on the subject, when confronted with his Application for Preliminary Injunction Pinto had no choice but to acknowledge that he had "word" that the incumbent administration intended to enter into a collective bargaining agreement with a union.[10] (T-210, 211)

The motivation behind the decision of Roy Pinto and his supporters not to seek the involvement of the Executive Board in collective bargaining with BARSUEA is self-evident. Of the thirteen members on the Executive Board, only four including Pinto were

[10] Roy Pinto was so desperate to claim that he was out of the loop with respect to BARSUEA that he initially appeared to claim that reference in the Application for Preliminary Injunction to being burdened with a "lame duck, last minute collective bargaining agreement" referred to a contract which would be negotiated on behalf of the employees represented by Respondent as opposed to employees that it employed. (T-210, 211)

supporters of the Pinto slate. (T-162, 175, 17618, 19) Unless and until the Pinto and his supporters had the votes to control the operation of Respondent's Executive Board they had no desire and saw no need to involve the Executive Board in Respondent's dealings with BARSUEA. Asked why he had he enough "word" to raise the issue of Respondent engaging in collective bargaining with BARSUEA to the Court, but not enough "word" to bring the issue to the Executive Board, Roy Pinto stated, "It wasn't – yes, it is. It actually is an issue, but we had a lot more important things happening at that time period, especially there was only four of us." (T-211) Later in his testimony, Pinto opined that until his supporters had control of the Executive Board, he didn't view the composition of the Board as settled, saw no reason for it to meet and questioned its existence.[11] (T-212, 213)

While the Administrative Law Judge found that the ultimate authority to enter into a collective bargaining agreement rested with the Executive Board he failed to acknowledge the admission by Roy Pinto, the agent of Respondent who later repudiated the collective bargaining agreement, that as an Executive Board member he had the authority to convene a vote of the Executive Board that could have asserted a claim over collective bargaining authority. He also failed to acknowledge the admission by Pinto that he failed to take such action because he only had the support of 4 of the current Executive Board members. (ALJD p. 6, l. 12-14)

On July 19, 2010 Respondent and BARSUEA executed a collective bargaining agreement. (GCX-9, T-36, 37) Don McNany, on behalf of Respondent, hand-delivered a

[11] Pinto's candidate for Executive Vice-President Timothy Walsh testified that he believed that Don McNany had enough votes on the Executive Board to do anything he wanted. (T-255)

copy of the contract to Respondent's Secretary-Treasurer, Sam Brezler at Respondent's Harrisburg offices in late July 2010. (T-38, 72) Either on the evening of July 19, 2010 or the morning of July 20, 2010, BARSUEA's President Shawn Hood told BARSUEA's Secretary-Treasurer Patricia Hurd about the contract and asked her to request from Respondent the names and addresses of all of Respondent's employees. (T-140)

On July 20, 2010 Patricia Hurd traveled to Respondent's Harrisburg, PA office. Upon arriving she learned that Roy Pinto was going to be sworn in to office as Respondent's President that afternoon. She had already prepared a letter addressed to Don McNany requesting on behalf of BARSUEA the names, addresses and employee numbers of Respondent's employees. She placed the letter in McNany's mailbox, which was behind the receptionist's desk and part of a bank of mailboxes used by officers and employees of Respondent to communicate with each other. Based on what she had learned upon her arrival, Hurd handwrote a cover sheet which stated, "Roy, In light of the day's events, I am providing you with a copy of the attached correspondence to Don McNany Trish 7-2-10". She put the cover sheet and the information request in to Roy Pinto's mail box. (T-140-143, GCX-11, 12)

The letter clearly suggested that BARSUEA represented Respondent's employees. Consistent with his refusal to acknowledge the existence of BARSUEA until he controlled the Executive Board, Roy Pinto claimed that he never saw the information request. (T-196, 197)

Later in the day on July 20, 2010 Roy Pinto was sworn in as President, Jason Bloom was sworn in as Western Vice-President and Ralph Tressler and Mark

Truszkowski were sworn in as Executive Board members.[12] (T-161) That still left the Pinto slate as a minority on the Executive Board.

Although Jason Bloom was not yet sworn in to office, on July 17, 2010 he sent all of Respondent's Business Agents a letter in which he required them to submit a letter no later than July 20, 2010 expressing a desire to be retained as Business Agents. It added that all who were interested in remaining as Business Agents would be interviewed. (RX-7, T-227-229) BARSUEA was not informed that the letter would be issued. (T-169) Ultimately all but one Business Agent who retired were interviewed between August 3 and August 18, 2010. (T-229) Business Agents who participated in the interviews were not given any indication that anyone would be terminated. (T-169, 235) The Administrative Law Judge, nevertheless, found that the July 17, 2010 letters provided notice to BARSUEA and an opportunity to bargain over the discharges of the Business Agents who would not actually be identified until August 20, 2010. (ALJD p. 8, l. 1-9)

After receiving no response to her July 20, 2010 information request, Patricia Hurd repeated her information request in a letter to Jason Bloom dated August 16, 2010. She noted that this was her second request. She transmitted the letter to Bloom either by email or by placing it in his mailbox. (GCX-13, T-144, 145) Respondent did not provide the requested information until November 9, 2010. (T-146, RX-11) Roy Pinto testified that he didn't provide the information sooner simply because he didn't get around to it.

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[12] Although the Election Committee appointed by President Don McNany with the approval of Executive Board (GCX-2 Article VIII Section 3) was ordered by the Court to certify these individuals as winning their positions by July 8, 2010 and to swear them into office on or before August 9, 2010 (GCX-8, page 6), it appears that Roy Pinto immediately upon receiving the Court's July 15, 2010 opinion took it upon himself to schedule the swearing in for July 20, 2010. (T-190, 194, RX-2) Pinto would therefore have been acting outside of his authority. Nevertheless, the General Counsel stipulated that as of July 20, 2010 Pinto was sworn in as Respondent's President. (T-59)

(T-217) Jason Bloom, however, acknowledged that there was a conscious decision to withhold the information. It was Respondent's view that they didn't know if BARSUEA was "for real" and that if BARSUEA really wanted the information they could subpoena it. (T-236)

On August 17, 2011 there was a runoff election for the remaining nine unresolved positions on the Executive Board. Roy Pinto's slate was successful in winning each of these positions. All of the candidates were immediately sworn into office. (T-199, 161, 162, 32, 33) For the first time the Pinto slate had a majority on the Executive Board. Now that he had a majority, Pinto did an about face concerning the viability of the Executive Board. He convened an Executive Board meeting on August 17, 2010 immediately upon the completion of the election. (T-213, 199)

The July 19, 2010 collective bargaining agreement between Respondent and BARSUEA at Article VII Section 2. states, "The Employer shall notify the Association of all discipline and discharges and will be processed in a timely manner. The filing time will begin once the Association is notified." (GCX-9)

On August 18, 2010 Respondent terminated support staff employee Sonya Corish. (T-164, 199, 200, 233, RX-23) Corish was allegedly terminated because of poor job performance over an extended period of time. (T-235) By letters dated August 20, 2010 Respondent terminated Business Agents John Miller, Shawn Hood, Patricia Hurd, Lee Dyches, William Parke, Robert Smith and Larry Blackwell. (GCX-14, T-164, 200) Roy Pinto admits that the Business Agents were terminated, in part, because of their support for the candidacy of Don McNany. (T-170, 201) Respondent acknowledged that it did not follow a progressive discipline system before terminating either Corish or the Business

Agents. (T-166, 168, 201) The discharges of Blackwell and Smith were subsequently rescinded before either Business Agent lost any time from work. (T-165) Before terminating Corish, Miller, Hood, Hurd, Dyches, Parke, Smith and Blackwell, Respondent provided no notice to BARSUEA of its decision to terminate them. (T-91, 169)

Prior to January 1, 2007 Commonwealth corrections officers who accepted employment with Respondent had to leave the payroll of the Commonwealth. This changed on January 1, 2007. Starting on that date Business Agents who worked for Respondent received pay from the Commonwealth's payroll. Respondent simply reimbursed the Commonwealth for Commonwealth pay received by the former Corrections Officers while they worked as Business Agents. While this remedied a problem for Business Agents hired by Respondent after January 1, 2007, it did not address the fact that the Business Agents who returned to the Commonwealth's payroll on January 1, 2007 could not collect from the Commonwealth vacation and sick time accrued while they were not on its payroll.[13] Respondent promised to remedy this by paying its Business Agents for their unused leave accrued prior to January 1, 2007 upon their separation. (T-82, 83, 131, 132,43-46, 151-157) This policy remained in place under Article X Section 5 of the collective bargaining agreement. (GCX-9)

Article X Sections 1 and 4 of the collective bargaining agreement added a severance pay benefit except for employees terminated for just cause. Article VII Section 1 of the contract added a provision that there would be no discipline or discharge of any

[13] During this period of time Business Agents also received no credit towards their Commonwealth pensions. (T-82,83)

employee without just cause. (GCX-9) Previously Respondent's employees had been "at will" employees. (T-39, 72)

On August 23, 2010 BARSUEA filed three grievances with Respondent. The grievances alleged that Respondent violated the collective bargaining agreement by terminating employees without just cause, by failing to compensate employees for negotiated severance pay and unused leave and by failing to bid the representation of Locals that became vacant. (GCX-15, T-170)

Respondent admitted that it paid none of the terminated Business Agents for their accrued leave or their contractual severance pay.[14] (T-170, 171, 89, 146, 151) It further acknowledged that it refused to process the grievances. (T-171-173) Its conduct was guided by a claim that the collective bargaining agreement was a fraud and that it was not obligated to abide by its terms. (T-173)

Respondent, through it attorney, summarized its position with respect to its obligations to BARSUEA in a letter dated August 27, 2010. Although Roy Pinto had received a representation petition filed by BARSUEA, told Don McNany to handle it and knew that a election was conducted by the Board on July 12, 2010, the letter stated that Respondent had only recently learned of BARSUEA's existence. The letter also stated that Respondent knew nothing of the July 19, 2010 collective bargaining agreement even though it was executed by its President, Don McNany who in conformity with the

[14] The Business Agents who supported Don McNany were keenly aware of the animosity that the incoming President had towards toward them. Individuals on Pinto's slate who had not been off the Commonwealth's payroll during the period prior to 2007 were publicly stating that the long time Business Agents who had served McNany should not be paid for their accrued leave. Accordingly, McNany's Secretary-Treasurer suggested that the Business Agents apply for the leave even though they had not yet been notified that they would be terminated. (T-132, 133)

Memorandum Opinion and Order of the Court of Common Pleas (GCX-8) still lawfully held the office when he executed it. Although processing of the petition was referred by Roy Pinto to Don McNany as President, and not to the Executive Board, Respondent now contended that McNany and presumably Executive Vice-President and Executive Board Member Ed McConnell, who actually entered into the election agreement, had no authority to do so. Respondent also argued that the July 19, 2010 collective bargaining agreement was invalid because it was executed before the July 21, 2010 certification date and because the agreement was not approved by the Executive Board. The letter concluded with a threat to take "formal action" against the officers of BARSUEA unless they reconsidered their actions. (GCX-16)

III. ARGUMENT

A. Respondent in violation of Section 8(d) and 8(a)(1) and (5) of the Act failed to give effect to and repudiated its collective bargaining agreement with BARSUEA

The events described in the record make one fact abundantly clearly. The campaign that led up to the election of the Pinto slate was marked by extreme animosity between the Pinto and McNany slates. While the current officers of Respondent attempted to continue their campaign against the McNany slate making allegations in the hearing against supporters of the Pinto slate unrelated to the instant litigation, Counsel for the Acting General Counsel attempted to limit his presentation of the case to the matter at hand. (e.g. T-109, 110, 127-130, 278-280) Nevertheless, the animosity between the two camps is hard to ignore. Even the Court of Common Pleas in ruling on Roy Pinto's Application for a Preliminary Injunction noted the animosity between the two slates. (GCX-8 page 1, 2)

Viewed in this context it is clear that Respondent's employees who had supported the McNany slate during the campaign had reason to suspect that there would be some form of retribution if the Pinto slate was successful in taking over control of Respondent. Employees had already heard that Pinto intended to renege on Respondent's policy of paying senior employees who had been off the Commonwealth's payroll prior to January 1, 2007 for the leave they had accrued during that period. (T-132, 133) Indeed, there was no disguising Roy Pinto's intention to punish these employees. Of all the issues facing an incoming administration, Roy Pinto chose to argue in his Application for Preliminary Injunction that he should be sworn in sooner rather than later so that he would not be restricted by a collective bargaining agreement in his dealings with these employees. (GCX-7 page 3)

The Administrative Law Judge claimed that a payment to Shawn Hood authorized by Don McNany, shortly before McNany was to leave office and a new and hostile administration was to take over, was collusive. However, he stated no basis to believe nor was there any evidence to establish that Hood wasn't entitled to the money. The best he could do, in the absence of evidence, was to state that in his opinion the payment was "questionable". (ALJD p. 7, l. 3-7) He did not even venture a guess as to what Don McNany supposedly received from the Hood or BARSUEA. Nevertheless, based entirely on his personal distaste for the terms of the collective bargaining agreement and speculation, the Administrative Law Judge stated, "The relationship between Hood and McNany was not at arms length and it infected the whole bargaining process that led to the signing of the July 19 agreement." (ALJD p. 7, l. 7-9) He incorrectly failed to acknowledge that from the perspective of the McNany slate, which was still in his office,

it was simply a collective bargaining agreement entered into by an employer not bent on seeking revenge against its political opponents. In the final analysis, the viability of the collective bargaining agreement should not have been determined by the Administrative Law Judge serving as an arbiter of the charges and counter-charges coming out of the campaign but rather should have been resolved through the application of contract law.

If applicable case law had been applied the Administrative Law Judge would not have been guided by his low opinion of the terms of the contract or the relationship between the McNany slate and Respondent's employees. In *Teamsters Local Union No. 574*, 259 NLRB 344 (1981) the Board was presented with facts strikingly similar to those in the instant case. A clerical staff of a union that supported the incumbent Secretary-Treasurer formed an independent union and negotiated a collective bargaining agreement with the Secretary-Treasurer shortly before he was voted out of office. The contract protected the employees from a new administration that was hostile to them by providing for severance pay and other protections. The lawfulness of the contract was found to be unaffected by whether the union employer gave the employees' union a hard time or an easy time in coming to the terms of an agreement. The union employer was found to have violated Section 8(a)(1) and (5) of the Act by repudiating the contract. *Id.* at 350

The Administrative Law Judge's efforts to distinguish this case fell wide of the mark. (ALJD p. 7, n. 5) In *Teamsters Local Union No. 574* the union employer attempted to justify its repudiation of the contract by claiming that its former administration unlawfully assisted the employee union. The fact that Respondent in the instant case didn't even make this claim doesn't impact the fact that *Teamsters Local Union No. 574* stands for the proposition, applicable here, that a contract entered into by

an outgoing administration affording protections to its employees that would not be granted by the incoming hostile administration can not for that reason be lawfully repudiated by the incoming administration. This principle is also unaffected by the Administrative Law Judge's observation that in *Teamsters Local Union No. 574* the vote that ultimately removed the Secretary-Treasurer from office had not yet occurred when the contract was signed. Finally, despite the absence of evidentiary support, the Administrative Law Judge noted and was apparently influenced by his gratuitous assertion that it appeared to him that McNany and Hood tried to keep their negotiations secret. (ALJD p. 6, l. 33-34) Yet in his discussion of *Teamsters Local Union No. 574*, he failed to note that in that case the Secretary-Treasurer specifically instructed the union represented employees not to tell anyone about the contract so that it would not become an issue in his campaign. *Teamsters Local Union No. 574*, supra at 346 This fact did not keep the Board from approving the Administrative Law Judge's finding that the incoming administration violated the Act by repudiating the collective bargaining agreement. In short, the Administrative Law Judge's refusal in the instant case to find a violation has not been nor can it be reconciled with decision in *Teamsters Local Union No 574.*

The Administrative Law Judge found that President Don McNany had no authority on behalf of Respondent to enter into a collective bargaining agreement with BARSUEA on July 19, 2010 without a specific grant of authority from the Executive Board. (ALJD p. 5, l. 38-46) He accomplished this by simply failing to cite those portions of the constitution which don't support his conclusion. Article V, Section 3(a) of the constitution states, "The President shall have direction and supervision of all subordinate bodies, unless otherwise determined by the Executive Board, and shall exercise day-to-

day supervision over the affairs of the Association, consistent with policies established by the Executive Board." Article V, Section 3(g) states further that, "When the President makes a decision or issues an order to a subordinate body or to the officers or members thereof, the same shall be complied with until such decision or order is reversed by the Executive Board." (GCX-2)

This is not to say that there aren't any provisions of the constitution that can be interpreted to suggest that authority for collective bargaining might reside with the Executive Board. What is clear is that there is no provision that specifically deals with who had the authority to engage in collective bargaining on behalf of Respondent. (T-50) Moreover, there was no past practice to rely on as Respondent had not previously engaged in collective bargaining with respect to its employees. (T-17) Fortunately the constitution is very clear as to how questions which aren't specifically addressed are to be resolved. Article V, Section 3(i) states, "When any question arises regarding the construction or interpretation of the Constitution, the President shall in the first instance, decide any such question subject to the approval of the Executive Board. The President's interpretation and construction of the Constitution shall be accepted and shall be binding upon all parties, subordinate bodies, officers and members of the Association pending approval or change of such interpretation or construction of the Constitution by the Executive Board."[15] (GCX-2) Again, Article V, Section 3(g) states further that, "When the President makes a decision or issues an order to a subordinate body or to the officers or members thereof, the same shall be complied with until such decision or order is

[15] Article IV, Section 5 of the constitution by implication confirms the authority of the President, as well as the Executive Board, to make decisions that bind Respondent. (GCX-2)

reversed by the Executive Board." (GCX-2) The constitution establishes that McNany in the first instance had the authority to interpret the constitution as authorizing him to engage in collective bargaining and to enter into an agreement and that while the Executive Board had the right to overrule him, unless and until it chose to do so, his interpretation was binding on Respondent. The Administrative Law Judge simply distorted the plain meaning of these provisions to find otherwise. (ALJD p. 6, l. 9-14)

Respondent's current President, Roy Pinto knew that under Article VI, Section 1(c) of the Constitution as a current member of the Executive Board he could have put the issue of McNany's authority to execute a collective bargaining agreement up for a vote. (T-18, 19 175) Instead, he purposely chose not to involve the Executive Board. He testified that he considered the Board "unsettled" and questioned its existence.[16] (T-211-213) His first order of business in opposing collective bargaining with BARSUEA was to try to replace the Executive Board as soon as possible. He claimed that the Executive Board had an indispensable role in collective bargaining only after he succeeded in changing the identity of its members.

In these circumstances, Respondent is equitably estopped from contending that only its Executive Board and not its President had authority to enter into a collective bargaining agreement with BARSUEA. This argument is not raised by Counsel for the

[16] As noted above, the constitution makes clear that the President's interpretation of the constitution, as well as his decisions, are binding on Respondent, unless and until they are overturned by the Executive Board. Pinto's view that the Executive Board was inoperative at the time only serves to reinforce the conclusion that as President, Don McNany's interpretation of his constitutional authority to engage in collective bargaining was binding on Respondent. Moreover, Pinto's view taken to its logical conclusion would mean that Respondent could have legally refused to bargain with BARSUEA based on a claim that its President had no authority to bargain while its Executive Board, which supposedly had the authority, could not because, at the time, it was defunct.

Acting General Counsel as an afterthought. It was prominently presented in Counsel for the Acting General Counsel's brief to the Administrative Law Judge. If the Administrative Law Judge had applied this principle he would have unable to rely on Respondent's belated claim that Executive Board approval was required for Respondent to enter into a collective bargaining agreement. The Administrative Law Judge was only able to find that Respondent lawfully repudiated the collective bargaining agreement by simply refusing to acknowledge that the Acting General Counsel made the argument or that the principle in question even exists.

In *RPC, Inc.*, 311 NLRB 232 (1993) the employer knew that union had undergone an affiliation, failed to challenge the legitimacy of the affiliation and recognized the union. The union relied on the employer's failure to challenge its affiliation to its detriment because if there had been a timely challenge it would have been in a better position to establish that its affiliation procedure was valid or to rectify any infirmity in that procedure. In these circumstances, the employer was equitably estopped from relying on alleged affiliation irregularities for its refusal to recognize the Union. The same principle applies here. Respondent through its President Don McNany engaged in collective bargaining and entered into a contract with BARSUEA.[17]

[17] Roy Pinto's personal knowledge of this fact is irrelevant. This situation is not comparable to a Section 8(a)(3) discharge case where there could be an issue as to whether an employer's agent with knowledge of an employee's union activity contributed to the decision to terminate an employee. See e.g. *Dr. Phillip Megdal, D.D.S. Inc.* 267 NLRB 82 (1983) Here, the only issue is whether an agent of Respondent engaged in bargaining and executed a collective bargaining agreement. Unlike in a Section 8(a)(3) discharge case, proof of Respondent's motive for subsequent action is not an element of the alleged violation. It is enough that Don McNany bargained with BARSUEA and entered into a collective bargaining agreement at a time when he was Respondent's agent. *Fisher Theatre*, 240 NLRB 678 n. 51 (1979) In any event, as noted earlier, Roy Pinto

Respondent failed to timely claim that only its Executive Board had authority to execute a collective bargaining agreement. Here the detriment to BARSUEA not only existed but came about through the calculation of Respondent's new leadership. Until the new Executive Board was sworn in after the runoff election on August 17, 2010, McNany could have submitted the contract to the Executive Board for approval and it would have been approved. Even Respondent's new leadership acknowledges McNany had enough votes on the Board to do whatever he wanted. (T-255) The Pinto slate, consequently, only claimed that the Executive Board had the exclusive authority to enter into a collective bargaining agreement after it could obtain the outcome that it wanted. (T-212, 213) Respondent is equitably estopped from doing this. See *Glass Workers Union Local No. 1220*, 162 NLRB 168, 176, 177 n. 19 (1966) (Reliance on constitution and bylaws a "legal afterthought" which doesn't void a contract, even though the constitution stated that the approval of the general executive board was a condition precedent to a contract.); *Teamsters Local Union No. 574*, supra at 350 (Union estopped from claiming executive board approval needed for collective bargaining agreement after outgoing Secretary-Treasurer negotiated agreement and union's attorney assured employees that executive board approval was not needed.); *Television Artists AFTRA, (Eleven-Fifty Corp),* 310 NLRB 1039, 1044 (1993) (Union that never informed employer that executive board approval was required is bound to contract despite the absence of approval.)

A concept somewhat related to equitable estoppel is the doctrine of apparent authority. An agent with no actual authority may still bind a principal if the agent exercises apparent authority. In order to establish that there was apparent authority for an

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knew far more about BARSUEA's existence and efforts to get a collective bargaining agreement than he was willing to admit.

act, two conditions must be satisfied: (1) some manifestation by the principal to a third party, and (2) the third party must believe that the extent of authority granted to the agent encompassed the contemplated activity. *Millard Processing Services, Inc.* 304 NLRB 770, 771 (1991) "An agent has apparent authority to speak for a principal when the principal does something or permits the agent to do something, which reasonably leads another to believe that the agent had the authority he purported to have." *Cablevision Industries*, 283 NLRB 22, 29 (1987) see also *Massey Energy Co.*, 354 NLRB No. 83, slip op. 78 n. 11 (2009)

At the time Don McNany executed the collective bargaining agreement he was the President of Respondent and a member of the Executive Board. According to Respondent's constitution as President he was charged with the responsibility to act as its principal executive and administrative officer, perform unspecified duties as the constitution may require, interpret the constitution and exercise day-to-day supervision over Respondent's affairs. (GCX-2, Article V Sections 3(a), (e) and (i)) This grant of authority put the President in a position that third parties would have reason to believe that he spoke for and acted on behalf of Respondent. Indeed, Respondent simply by granting McNany the title of President would have done that.[18] Thus, in refusing to find

[18] The Administrative Law Judge in finding that McNany did not possess apparent authority cited *300 Exhibit Services & Events, Inc.*, 356 NLRB No. 66 (2010) In *300 Exhibit Services & Events, Inc.* an administrative law judge ruled, with Board approval, that a lower level supervisor whose duties were limited to requesting employees from the union's hiring hall, directing employees, handling grievances, and recommending the hiring and firing of employees would not be reasonably assumed to have the authority to sign a collective bargaining agreement. *Id* at op. 6 By contrast, McNany, as President of Respondent was its highest ranking officer and was specifically charged with acting as its principal executive and administrative officer. Thus, he would be reasonably assumed to have the authority to enter into a collective bargaining agreement with a labor

that Don McNany had apparent authority to enter into a collective bargaining agreement the Administrative Law Judge was simply wrong in stating that, "There was thus no manifestation by anyone from Respondent, aside from McNany, its purported agent, to Hood that would provide a reasonable basis for him, or anyone else, to believe that McNany had the apparent authority to negotiate and conclude a collective bargaining agreement on behalf of Respondent." (ALJD p. 6, l. 27-30) The Administrative Law Judge's second reason for refusing to find apparent authority is even less convincing. He asserted that, "...the Respondent's new leadership gave no signals that McNany was acting in its interest." (ALJD p. 6, l. 24-25) As he did throughout his Decision, the Administrative Law Judge blurred the distinction between having amassed the most votes and actually having been sworn into office. The record is clear through both the terms of Respondent's constitution and Judge Dowling's decision applying the constitution and election rules that on July 19, 2010, when Don McNany executed the collective bargaining agreement, there was no new leadership. Don McNany was Respondent's only President. The Administrative Law Judge failed to provide any guidance as to why Respondent's President, before he could act, would need "signals" of approval from his political opponent, who was not yet in office.

In *Demolition Workers Union Local 95 (Mackroyce Dismantling, Ltd.),* 330 NLRB 352 (1999) the issue of apparent authority arose in circumstances similar to McNany's. In that case the union's President agreed to the terms of a collective bargaining agreement that the union later refused to execute. The collective bargaining agreement was found to be binding on the union even if its President had no actual

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organization. The Administrative Law Judge's citation of this case was inapposite to the facts presented in the instant case.

authority to agree to it. Apparent authority to enter into an agreement was found based on the fact that as of the time its President agreed to the collective bargaining agreement no representative of Respondent did anything to alter the perception that the President had the authority to do what he did. *Id.* at 357-358. Also see *Carpenters Local 405 (Office and Professional Employees International Union, Local 29)*, 328 NLRB 788, 792, 793 (1999)

Prior to McNany's execution of the collective bargaining agreement, Pinto had seen the representation petition and knew that Shawn Hood had filed it on behalf of BARSUEA. (T-14, 15, 17, 189, 193) [19] As revealed by the contents of his Application for Preliminary Injunction, he also suspected that Don McNany intended to enter into a collective bargaining agreement. (GCX-7 page 3) He, nevertheless, chose not to approach Hood and warn him that Respondent's President was allegedly not authorized to enter into a collective bargaining agreement with BARSUEA. As Respondent failed to act, BARSUEA could only reasonably conclude based on McNany's status as President coupled with his assurances to Hood across the bargaining table that no one else was necessary to enter into a binding collective bargaining agreement (T-34, 35, 87) that, in fact, he had the authority to bind Respondent to the agreement. In these circumstances, Don McNany had apparent authority to negotiate on behalf of Respondent and to bind Respondent to the July 19, 2010 collective bargaining agreement. *Demolition Workers Union Local 95 (Mackroyce Dismantling, Ltd.),* supra at 358

[19] As Roy Pinto received a copy of the representation petition, which identified Shawn Hood as BARSUEA's President, it is proper to infer that Pinto knew Hood was BARSUEA's President. *The Goodyear Aerospace Corporation,* 234 NLRB 539, 541 (1978); *Kaiser Steel Corporation,* 211 NLRB 446 n. 4 (1974)

Although obligated to give effect to the collective bargaining agreement, Respondent refused to do so. Respondent's new President Roy Pinto admitted that Respondent did not consider itself bound by the collective bargaining agreement. (T-173) In violation of the contract, Respondent failed to pay the terminated employees their severance pay and the leave they accrued while they were off the Commonwealth's payroll. (T-170, 171, GCX-9 Article X Section 1, 5) Respondent also refused to process the grievances filed by BARSUEA concerning these contract violations. (T-171-173, GCX-15, GCX-9 Article VIII) By letter dated August 27, 2010, Respondent categorically repudiated the collective bargaining agreement. (GCX-16, T-171, 172) By each of these acts, Respondent refused to bargain collectively with the exclusive collective bargaining representative of its employees within the meaning of Section 8(d) and Section 8(a)(1) and (5) of the Act.

B. Respondent in violation of Section 8(a)(1) and (5) of the Act terminated its employees Larry Blackwell, Sonya Corish, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, Bill Park, and Robert Smith without prior notice to BARSUEA and without affording BARSUEA an opportunity to bargain.

An employer must bargain with the union representing its employees before it unilaterally undertakes discretionary acts involving mandatory subjects of bargaining where: (1) the employer's bargaining obligation has recently attached; and (2) the employer is continuing to exercise the same kind of discretion it had previously exercised prior to its having a bargaining obligation. See e.g. *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion.") For example, in *Eugene Iovine, Inc.*, 328 NLRB 294, 294-295, 297 (1999), enf'd. mem. 242 F. 3d 366 (2d Cir.

2001) the Board held that an employer violated Section 8(a)(1) and (5) of the Act when it unilaterally reduced employees' hours of work, despite the employer's argument that it had a past practice of reducing employees' hours during business slowdowns. The Board found that this was "precisely the type of action over which an employer must bargain with a newly-certified Union," as there was no " 'reasonable certainty' as to the time and criteria for [the] reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours 'appear[ed] to be unlimited.'" *Id.* at 294 Similarly, in *Adair Standish Corp.*, 292 NLRB 890 n. 1 (1989) enf'd. in relevant part, 912 F. 2d 854 (6th Cir. 1990), the Board held that an employer could no longer continue to unilaterally exercise its discretion with respect to layoffs after the union was certified, despite a practice of instituting economic layoffs.

It is well settled that a decision to discharge an employee is a mandatory subject of bargaining. *Crestfield Convalescent Home*, 287 NLRB 328, 328 (1987); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) Nevertheless, recent cases decided by the Board have been somewhat nuanced in defining an employer's pre-implementation obligation to bargain with respect to discipline and discharge.

Although the case was decided by a two member Board and has been remanded to the Board (See *New Process Steel v. NLRB,* 130 S. Ct. 2635 (2010)), *Alan Ritchey, Inc.,* 354 NLRB No. 79 (2009) provides the most recent synopsis of the law applicable to an employer's pre-implementation bargaining obligation concerning employee discipline or discharge in a new bargaining relationship. The Board in *Alan Ritchey, Inc.*, reconciled the holdings in *Fresno Bee,* 337 NLRB 1161 (2002) and *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001) *Id.*, slip op. at 4 n. 11 Consistent with *Fresno Bee* the Board held

that the Employer had not violated Section 8(a)(1) and (5) by unilaterally imposing discipline on employees where the employer's discipline "was meted out in the context of a five-step progressive discipline system, which predated the Union's selection as bargaining representative." *Id.* slip op. at 4 n. 10 Further, the discretion that the employer exercised in applying its pre-existing policies "operated within the parameters" of that progressive discipline procedure." *Id.,* slip op. at 4 In reaching its decision the Board rejected any suggestion that absent the limits on the Employer's discretion in meting out discipline it would find no obligation for pre-implementation bargaining. Rather it stated that it had chosen to not decide precisely how much discretion is required before a duty to bargain attaches. *Id.,* slip op. at 4 n. 12 The Board stated that in the event there had been sufficient discretion consistent with past practice to otherwise give rise to a pre-implementation bargaining obligation, it would have applied *Washoe Medical Center* to find no duty to bargain in the absence of a previous request for pre-discipline bargaining.[20] *Id.,* slip op. at 4 n. 11

In the instant case, proof of BARSUEA's request for pre-implementation notice of discipline or discharge, which would provide the opportunity to bargain, is in writing. The collective bargaining agreement entered into between Respondent and BARSUEA at Article VII Section 2 states, "The Employer shall notify the Association of all discipline and discharge and will be processed in a timely manner." (GCX-9) Although Respondent claimed that it is not bound by the collective bargaining agreement, at the very least, this

[20] Although violations were found with respect to other issues in *Washoe Medical Center, Inc.* 337 NLRB 202 (2001) the Administrative Law Judge indicated incorrectly that a violation was found with respect to the obligation to provide pre-implementation notice and an opportunity to bargain over discipline. (ALJD p. 7, n. 6) In fact, in that case because of the Union's failure to request notice, no violation was found. Id. at n. 1; *Alan Ritchey, Inc.* supra at slip op. n 11)

provision shows that Shawn Hood, on behalf of BARSUEA, requested Respondent's President, Don McNany to provide notice to the union of any discipline or discharges. The existence of this request is not affected by whether or not the collective bargaining agreement is found to be viable. In finding a violation with respect to the termination of Sonya Corish and failing to finding a violation with respect to the terminations of Larry Blackwell, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, Bill Park, and Robert Smith, the Administrative Law Judge erred in failing to address the fact that BARSUEA's requested pre-implementation notice of discipline or discharge.[21] (ALJD p. 8, l. 1-51; l. 1-9)

It was also established that Respondent in deciding to terminate Larry Blackwell, Sonya Corish, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, Bill Park, and Robert Smith exercised unlimited discretion consistent with its past practice. Respondent's constitution sets forth no standards that would guide the President in the exercise of his authority to discharge or otherwise discipline employees. (GCX-2 Article V Section 3(c)) Don McNany confirmed that the employees were employed "at will" and that there was no limit on his use of discretion in deciding issues of discipline or termination. (T-39, 40, 72)

The Administrative Law Judge cited a policy statement signed by Don McNany on May 3, 2003 which provided for a progressive discipline system. (ALJD p. 8, l. 28-39)

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[21] An alternate resolution of this issue could be that the requirement established in *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001) that there needs to be a request for pre-implementation notice of discipline or discharge in order to trigger the obligation to give notice and an opportunity to bargain should be overruled. There is no such requirement with respect to unilaterally reducing employees work hours (*Eugene Iovine, Inc.* supra) or unilaterally laying off employees (*Adair Standish Corp.* supra) and there is no explanation in *Washoe Medical Center, Inc*, to explain why it should be any different with respect to discipline or discharges.

This statement might suggest that under Respondent's past practice there were some limitations placed on Respondent's discretion in disciplining or discharging its employees. Such a suggestion however would be incorrect. As this issue is relevant under the *Alan Ritchey, Inc.* line of cases, the Administrative Law Judge should have found that the alleged progressive discipline system was never put into effect. Don McNany explained that while the letter was discussed at a meeting it was never adopted as Respondent's policy nor was it ever followed. (T-72, 73) Testimony presented by Respondent's current administration only served to confirm this to be the case. Timothy Walsh identified numerous policies and testified that in order to be effective they needed to adopted by a vote of the Executive Board. In the case of each policy that he presented there was documentary evidence that it had been approved by the Executive Board. (RX-14-23, T-241, 242) In contrast, he conceded that there was no evidence that the purported progressive discipline policy had ever been approved. (T-258, 261, 262) More importantly, Don McNany testified that in practice discipline was not meted out in the context of a progressive discipline system. (T-41) He had terminated two employees in his tenure. He explained that the circumstances of each termination, the fact there was no limit on his discretion whether to let them go and that he did not act pursuant to an established policy. (T-39, 40, 41) Respondent did not dispute this testimony.

It also not disputed that after BARSUEA was certified as the employees' exclusive collective bargaining representative Respondent continued to discipline and terminate employees based on its unfettered discretion. Respondent concedes that it did not apply progressive discipline in terminating Larry Blackwell, Sonya Corish, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller, Bill Park or Robert Smith. (T-166, 168,

201) Moreover, it did not claim that its substantive reasons for terminating the employees were in accord with any recognized standards concerning what was considered misconduct. Respondent conceded that part of the reason it fired the Business Agents was because they did not support the Pinto slate in the election. (T-170) As incumbent officers had never before been voted out of office (T-13), there was no precedent to establish that this conduct constituted cause for discipline. With respect to any other motive Respondent may have had for terminating them, it failed to provide any reference to an established rule of conduct. With respect to Sonya Corish, Respondent seemed at a loss to even provide an explanation as to why she was terminated. Roy Pinto claimed she was terminated because she did not have a list of heart and lung cases as required by her job, (T-164) while Jason Bloom testified that it had nothing to do with that but rather concerned her prior performance. (T-235) Just as it had always done, Respondent terminated these employees exercising unlimited discretion outside the parameters of a progressive discipline system.

Although the foregoing establishes that Respondent had the obligation to do so, it presented no evidence nor even made a claim that it provided notice and an opportunity to bargain to BARSUEA with respect to Sonya Corish's August 18, 2010 termination. As a result the Administrative Law Judge correctly found that Respondent violated the Act by failing to provide notice to BARSUEA and an opportunity to bargain concerning her discharge. (ALJD p. 9, l. 1-2)

By contrast the Administrative Law Judge found that Respondent did not violate the Act with respect to the Business Agents who were terminated by letters dated August 20, 2010. The Administrative Law Judge found that although required to provide notice

of its intention to terminate the employees who ultimately received termination letters Respondent did so by sending out letters to the Business Agents dated July 17, 2010. (ALJD p. 8, l. 1-16) The letters did not in fact provide notice to anyone that Respondent intended to terminate them. (RX-7) The letters only stated that each Business Agent was required to submit a letter of interest to be considered for retention as a Business Agent. The letters that were sent to Business Agents who were retained were identical to the letters that were sent to the Business Agents who were ultimately terminated. (RX-7) Moreover, Respondent concedes that even after the Business Agents were interviewed they still didn't know whether they would be terminated. [22] (T-169) Thus, even if the letters can be construed, as they were by the Administrative Law Judge, as providing notice to BARSUEA that someone might be terminated, it gave no notice to BARSUEA that anyone in particular was slated for discharge. (ALJD p. 8, l. 7-8) It ignores reality to equate the two. While BARSUEA may very well have had no objection to the procedure for deciding who if anyone would not be retained, it is a very different issue once it has been determined that a particular person won't be retained. There is no dispute that Respondent never gave anyone prior notice that any particular Business Agent was going to be terminated – a very different issue than its decision to interview all of its Business Agents.

[22] During her interview that resulted from her expression of interest in continuing as a Business Agent, Patricia Hurd was assured by Jason Bloom that as far as he knew the process would not lead to discipline. (T-151)

Having failed to provide notice to BARSUEA prior to implementing its decision to terminate the employees, Respondent violated Section 8(a)(1) and (5) of the Act.[23] (T-91, 169)

C. Respondent in violation of Section 8(a)(1) and (5) of the Act refused to engage in post-termination bargaining with BARSUEA concerning the terminations of Sonya Corish, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Park.

Respondent unilaterally decided to rescind the terminations of Larry Blackwell and Robert Smith before they suffered any monetary impact. (T-165, 232) The terminations of Sonya Corish, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Park, however, were put into effect.

The Administrative Law Judge correctly found that Respondent failed to bargain over the effects of its decision to terminate Business Agents Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Park. (ALJD p. 9, l. 28-30)

An employer has an obligation, upon request, to bargain with the collective bargaining representative of terminated employees concerning their terminations, and/or the effects of their terminations, such as reinstatement rights. *N.K. Parker Transport, Inc.*, 332 NLRB 547, 551 (2000); *Ryder Distribution Resources,* supra A union, nevertheless, may waive its right to bargain about a mandatory subject if it does not request bargaining. The Board has held, however, that there is no waiver if it is clear that a request would have been futile. *L. Suzio Concrete Co.*, 325 NLRB 392, 398 (1998), enf'd. 173 F. 3d 844 (2d Cir 1999)

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[23] As Respondent did not even acknowledge the existence of BARSUEA until after it terminated the employees, Respondent would be hard-pressed to claim that it provided notice to the union.

Here, Respondent terminated Sonya Corish on August 18, 2010 and Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Park on August 20, 2010. BARSUEA promptly protested these terminations by filing a grievance on August 23, 2010. (GCX-15, T-170). The grievance was immediately followed on August 24, 2010 by BARSUEA's letter to Respondent suggesting that if there were any issues that Respondent wished to negotiate it should provide agenda items and dates and times when they were available. (T-218, RX-12) Respondent did not suggest that it ever offered dates or times when it would be willing to meet. Instead it responded by letter dated August 27, 2010 questioning the validity of BARSUEA's certification and threatening to look into taking action against former President Don McNany if he entered into an election agreement on its behalf. (GCX-16)

The Administrative Law Judge accurately analyzed the facts to find that BARSUEA requested effects bargaining with respect to the Business Agents and that Respondent failed to meet its obligations in this regard. (ALJD p. 9, l. 28-30) The same facts, however, would establish a violation with respect to employee, Sonya Corish. The Administrative Law Judge failed to make such a finding. He apparently was influenced by the fact that, unlike in the case of the Business Agents, he had already determined that Respondent had violated the Act with respect to pre-implementation bargaining over her discharge and that the remedy for such a violation could subsume the remedy for having failed to engage in "effects" bargaining. Nevertheless, as it is a separate and distinct violation, the Administrative Law Judge should have also found that Respondent violated the Act by failing to engage in bargaining over the effects of Sonya Corish's discharge.

Finally, even though the Administrative Law Judge found that BARSUEA requested effects bargaining, he should have also found that given Respondent's refusal to recognize BARSUEA as its employees' bargaining representative until some time later, no request was necessary. (GCX-16) Requesting bargaining was a futile act. Thus, whether or not it is construed that BARSUEA requested bargaining, Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain over the effects of its decision to terminate Sonya Corish, Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Park.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

PENNSYLVANIA STATE CORRECTIONS
OFFICERS ASSOCIATION

and

Cases 4-CA-37648
4-CA-37649 and
4-CA-37652

BUSINESS AGENTS REPRESENTING
STATE UNION EMPLOYEES ASSOCIATION

COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, the undersigned Counsel for the Acting General Counsel respectfully files the following Exceptions to the Decision issued by Administrative Law Judge Robert A. Giannasi on March 17, 2011:

1. To the Administrative Law Judge's finding that there was some confusion following the announcement of the results of the June 25, 2010 election concerning "when Pinto was going to take office and when McNany would leave office."[1] (ALJD p. 2, l. 38-39)

[1] Throughout the Exceptions references to the record and the Administrative Law Judge's Decision will be as follows:

Transcript	T	(followed by page number)
General Counsel's Exhibit	GCX	(followed by exhibit number)

2. To the Administrative Law Judge's finding that Don McNany moved out of the President's Office on June 29, 2010 and that Roy Pinto moved into the office on the same day. (ALJD p. 2, l. 40-41)

3. To the Administrative Law Judge's finding that "in some respects" McNany continued to act as President thereby suggesting that McNany didn't in all respect continue to act as President. (ALJD p. 2, l. 41-42)

4. To the Administrative Law Judge's finding that Roy Pinto filed a lawsuit to "clarify the situation" suggesting that there was some confusion concerning the procedures for succession and further suggesting that there was some issue before the Court other than whether it was appropriate to conduct an manual recount of the ballots before certifying the results and scheduling a runoff election for those positions that had not been resolved by the June 25, 2010 election. (ALJD p. 2, l. 45-47; GCX-7, 8)

5. To the Administrative Law Judge's finding that Judge Andrew Dowling ruled that Pinto and four other elected officers and Executive Board members, won their elections effective July 8, 2010 when in fact the Judge found that only Pinto, one officer and two Executive Board members should be certified as having won their positions. (ALJD p. 2, l. 47-50; GCX-8)

6. To the Administrative Law Judge's failure to acknowledge that the Judge Dowling ruled that the new President and the three other successful candidates were not required to be actually sworn into their positions until on or before August 9, 2010. (ALJD p. 2, l 47-50; GCX-8)

Respondent's Exhibit .....RX (followed by exhibit number)
Administrative Law Judge's Decision.....ALJD (followed by page and line number)

7. To the Administrative Law Judge's implication that members of the Executive Board were not aware that Business Agents Representing State Union Employees Association, herein called BARSUEA, had filed a representation petition, had won a representation election or that the incumbent officers of Respondent intended to engage in collective bargaining with the union. (ALJD p. 3, l. 31-33)

8. To the Administrative Law Judge's citation of and apparent reliance on the date that incoming officers were elected to their positions as opposed to the date they were sworn in and lawfully assumed their positions. (ALJD p. 4, l. 15-16)

9. To the Administrative Law Judge's finding that the Don McNany had no authority to negotiate a collective bargaining agreement because he was the "defeated former president of Respondent" thereby ignoring and failing to deal with indisputable evidence that he continued to hold the position of Respondent's actual President until July 20, 2010, the day after he signed the collective bargaining agreement. (ALJD p. 5, l. 29-30)

10. To the Administrative Law Judge's finding that there was confusion as to when Pinto would assume office and that the alleged confusion was resolved by the Court in finding that the election results should be certified as of July 8, 2010 as opposed to the date by which the Court ordered that Pinto should be sworn into office. (ALJD p. 5, l. 33-36)

11. To the Administrative Law Judge's finding that McNany physically abandoned his office on June 29, 2010 and the Pinto moved into the office the same day. (ALJD p. 5, l. 36-37)

12. To the Administrative Law Judge's conclusion that Don McNany was required to seek or receive specific authority from the Executive Board or Roy Pinto, who was not yet sworn in as President, to negotiate or sign a collective bargaining agreement (ALJD p. 5. l., 38-41)

13. To the Administrative Law Judge's conclusion that assuming Don McNany was President, he still did not have the authority to negotiate and sign the July 19, 2010 collective bargaining agreement without the approval of the Executive Board. (ALJD p. 5, l. 43-46)

14. To the Administrative Law Judge's failure to mention provisions of the Constitution which support the conclusion that the President has authority to enter a collective bargaining agreement without the approval of the Executive Board. (ALJD p. 5, l. 46-52, p. 6, l. 1-14)

15. To the Administrative Law Judge's reliance on the fact that the President's authority to interpret the Constitution is subject to the approval of the Executive Board, without noting that the Executive Board never sought to approve or disapprove his interpretation of the Constitution and that the Constitution states unless and until the Executive Board does so, the President's interpretation shall be accepted as binding on all parties. (ALJD p. 6, l. 9-14; GCX-2 Article 5 Section 3(i))

16. To the Administrative Law Judge's failure to find or to even consider that Respondent was equitably estopped from contending that its President did not have the authority without the approval of the Executive Board to enter into a collective bargaining agreement with BARSUEA. (ALJD p. 5, l. 43-52, p. 6, l. 1-14))

17. To the Administrative Law Judge's conclusion that President Don McNany did not have apparent authority to bind Respondent to a collective bargaining agreement. (ALJD p. 6, l. 16-17)

18. To the Administrative Law Judge's assertion that in order to have apparent authority to enter into a collective bargaining agreement, Respondent's President needed to be acting in the interests of his political opponents who at the time neither occupied the position of President nor enjoyed majority support on the Executive Board. (ALJD p. 6, l. 23-26)

19. To the Administrative Law Judge's unsupported assumption, contradicting both the Constitution and the Court's opinion, that upon the initial count of the ballots in the internal union election, Don McNany was immediately stripped of his title and authority as Respondent's President. (ALJD p. 6, l. 25-26)

20. To the Administrative Law Judge's conclusion that Respondent, other than through the words of McNany himself, made no manifestation to BARSUEA or anyone else that would provide a reasonable basis to believe that McNany had apparent authority to negotiate and conclude a collective bargaining agreement even though Respondent had granted McNany both the title and the authority to serve as its President. (ALJD p. 6, l. 27-31)

21. To the Administrative Law Judge's conclusion that it would exalt form over substance to conclude that McNany had authority to execute a collective bargaining agreement on July 19, 2010 when he was still President and not on July 20, 2010 when Pinto was sworn into office and that both Hood and McNany knew that McNany had no legitimacy to act on July 19, 2010. (ALJD p. 6, l. 35-39)

22. To the Administrative Law Judge's conclusion that his opinion concerning whether the substantive terms of the collective bargaining agreement were "legitimate" or the fact that BARSUEA's President had supported McNany in his campaign for President were relevant to whether McNany had actual or apparent authority to enter into a collective bargaining agreement. (ALJD p. 6, l. 42, 43, p. 7, l. 1-11)

23. To the Administrative Law Judge's conclusion that *Teamsters Local 575*, 259 NLRB 344 (1981) was distinguishable from the instant case and for raising distinctions between the cases that are irrelevant to the principles for which it was cited. (ALJD p. 7, n. 5)

24. To the Administrative Law Judge's statement that the Board in *Washoe Medical Center, Inc.,* 337 NLRB 202 (2001) found a violation with respect to an employer's obligation to provide pre-implementation notice to a newly selected labor organization with respect to the imposition of discipline or discharge. (ALJD p. 7 n. 6)

25. To the Administrative Law Judge's conclusion that Respondent's letter to its Business Agents, which stated that if the employees wished to remain employed they should submit a letter of interest, clearly implied to the employees that they might be terminated and that this notice satisfied its statutory obligation even though there was no prior notice identifying who, if anyone, Respondent ultimately intended to terminate. (ALJD p. 8, l. 1-8)

26. To the Administrative Law Judge's failure to find that the progressive discipline system asserted by Respondent was never adopted nor followed by Respondent prior to BARSUEA's selection as the employees' collective bargaining representative. (ALJD p. 8, l. 28-39)

27. To the Administrative Law Judge's failure to address the fact that BARSUEA in accordance with *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001) requested before-the-fact bargaining with regard to the imposition of discipline. See *Alan Ritchey, Inc.*, 354 NLRB No. 79 n. 11 (2009) (ALJD p. 8, l. 1-51, p. 9, l. 1-9)

28. To the Administrative Law Judge's failure to find that it would have been futile for BARSUEA to request bargaining over the effects of Respondent's decision terminate its employees because at the time Respondent did not recognize BARSUEA as the representative of its employees. (ALJD p. 9, l. 11-30)

29. To the Administrative Law Judge's failure to find that that Respondent violated Section 8(a)(1) and (5) by failing to bargain over the effects of its decision to terminate Sonya Corish. (ALJD p. 9, l. 28-30)

30. To the Administrative Law Judge's failure to provide for reinstatement and a make whole remedy for employees Lee Dyches, Shawn Hood, Patricia Hurd, John Miller and Bill Parke based on Respondent's failure to engage in before-the-fact bargaining regarding their discharges. Providing this remedy could negate reason for them to collect damages under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (ALJD p. 10, l. 25-52, p. 11, l. 1)

Dated: April 13, 2011

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